IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MR. JUSTICE T.R.RAMACHANDRAN NAIR

THURSDAY, THE 15TH FEBRUARY 2007 / 26TH MAGHA 1928

OP.No. 18362 of 1996(J)

PETITIONERS:
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1. KALI DAKSHAYANI, PANDOTHU KARIYIL, EZHUPUNNA MURI, AROOR VILLAGE, CHERTHALA TALUK, ALAPPUZHA DISTRICT.

2. SANKARAN KUMARAN, VADAKKE KUDAPPANATHARAYIL, CHANDIROOR MURI, AROOR VILLAGE, CHERTHALA TALUK, ALAPPUZHA DISTRICT. (DIED, L.RS. IMPLEADED)

ADDL. PETITIONERS:
3. ANANDAVALLY, W/O. RAVEENDRAN, MUTTUNKAL HOUSE, NEREKADAVU, UDAYANAPURAM P.O. VAIKOM.

4. PADMAVATHI, W/O. RAGHUVARAN, KANNUVELITHARA, POLESSERY, VAIKOM.

5. SATHYAN, S/O. KUMARAN, PALATHRA HOUSE, CHANDIROOR P.O. CHANDIROOR MURI, AROOR VILLAGE, CHERTHALA.

6. SINDHU, W/O. ANIRUDHAN, MUTHANTHARA NIKARTHU, KOVILAKATHUMKADAVU P.O. VAIKOM.

7. SHAJI, S/O. KUMARAN, PALATHRA HOUSE, CHANDIROOR P.O. CHANDIROOR MURI, AROOR VILLAGE, CHERTHALA,.
(ADDL. PETITIONERS 3 TO 7 IMPELADED AS L.RS. OF DECEASED R2 AS PER ORDER IN IA 1763/07 DATED 7.2.2007)

BY ADV. DR.P.S.KRISHNA PILLAI

RESPONDENTS:
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1. THE MUNSIFF'S Court, CHERTHALA.

2. THE LAND TRIBUNAL, CHERTHALA.

3. THE SUB Court, CHERTHALA.

4. OUSEPH LONAN, REISDING AT CHATTUTHARA, CHANDIROOR MURI,

AROOR VILLAGE. (DELETED)

5. EASI ALIKUTTY, DO. (DECEASED)

6. EASI XAVIER, DO. DO. (DECEASED)

7. EASI AUGUSTINE DO.

ADDL.R8: ANNKUTTY XAVIER, THUNDATHIL HOUSE, CHANDIROOR P.O. CHANDIROOR MURI, AROOR VILLAGE, CHERTHALA.

9. JOSEPH XAVIER, DO.

10. JOHNSON XAVIER, DO.

11. BENNY XAVIER, DO.

12. JANCY XAVIER, DO.

13. BINCY XAVIER, DO.

(R4 DELETED FROM THE PARTY ARRAY AS PER ORDER DATED 7.3.06 IN THE O.P.)
ADDL. R8 TO R13 IMPLEADED AS LEGAL HEIRS OF DECEASED ORIGINAL RESPONDENTS 5 AND 6 AS PER ORDER ON IA 1763/07 DT.7.2.07)

R1 TO R3 BY GOVERNMENT PLEADER
R5 TO R13 SRI.JOHN JOSEPH VETTIKAD.

THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD ON 15/02/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

EXT.P1-TRUE COPY OF OP (DR) 41/72

EXT.P2-TRUE COPY OF OBJECTION DATED 26.7.1972 TO EXT.P1

EXT.P3-TRUE COPY OF ORDER DATED 6.7.1976 IN OA 1379/75

EXT.P4-TRUE COPY OF OBJECTION DATED 30.3.77 TO EXT.P1

EXT.P5-TRUE COPY OF ORDER DATED 31.1.81 IN OA 398/77

EXT.P6-TRUE COPY OF ORDER DATED 16.1.87 IN OA RC 51/84

EXT.P7-TRUE COPY OF ORDER DATED 24.6.99 IN OP (DR) 41/72

EXT.P8-TRUE COPY OF MMEORANDUM OF APPEAL AGAINST EXTS.P6 AND P7

EXT.P9-TRUE COPY OF ADDL. OBJECTIONS DATED 23.7.1992 TO EXT.P1 FILED BY ADDL. COUNTER PETITIONERS 3 AND 5 IN EXT.P8 APPEAL,.

EXT.P10-TRUE COPY OF JUDGMENT DATED 11.10.96 IN AS 71/88

EXT.P10(A)-TRUE COPY OF DECREE DATED 11.10.95

EXT.P11-TRUE COPY OF NOTICE DATED 18.3.1996 TO FIRST PETITIONER FROM 2ND ESPONDENT.

// TRUE COPY //

J.B. Koshy & T.R. Ramachandran Nair, JJ.

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of the trial Court. The appellate decree was confirmed by this Court. Thereafter, a petition was filed by the second peitioner for redeeming the mortgage under Section 11 of Act 11 of 1970 (Agricultural Debt Relief Act). The first respondent filed an objection contending that petitioners are not entitled to redeem the mortgage as they have got fixity of tenure under the Kerala Land Reforms Act (KLR Act) (Act 1 of 1964). It is also contended that first respondent has constructed a residential building in the property and has effected improvements and he has been in continuous possession and enjoyment of the property for more than 20 years and has made permanent improvements. The matter was referred to the Land Tribunal for its decision. Originally the Land Tribunal refused to consider the matter on the ground that the deed shows that it s a mortgage deed. In appeal, the matter was remanded to the Land Tribunal and after remand case was renumbered as O.A. No.1379/1975. The Munsiff/Land Tribunal found that even though they cannot claim kudikidappu right, after the death of first respondent, supplemental respondents 3 and 5 have got kudikidappu right or in the alternative, kudiyiruppu right. Again the matter was remanded to the trial Court for deciding whether respondents 3 and 5 have got kudiyiruppu or kudikidappu right and the trial Court after receiving the findings, found that the petitioners are not entitled to redeem the property

since the respondents have got kudiyiruppu right. The appellate Court also considered the same and found that the respondents have got kudiyiruppu right. The courts below have considered the provisions of the mortgage deed also. As per the provisions of the deed, the respondents were given right to fill up the land and also cultivate and make improvements. A residential building was constructed therein after developing the land and it is not disputed that for the last more than 50 years, the respondents were in possession of the building and the property and enjoying the improvements also. We also note that even in 1945 the land before development and before filling it up, the amount given was Rs.196/-. It is almost equivalent to the market value and they were in possession.

2. After considering the evidence, the appellate Court also concurred with the findings of the Land Tribunal and the trial Court that the respondents have got kudiyiruppu right. Section 2(26) of the Kerala Land Reforms Act defines "kudiyiruppu" as follows:

> "26. "kudiyiruppu" means a holding or part of a holding consisting of the site of any residential building, the site or sites of other buildings appurtenant thereto, such other lands as are necessary of the convenient enjoyment of such residential building and easements attached thereto but does not include a kudikidappu."

A person who is holding kudiyiruppu right is a tenant as per the definition of 'tenant' under Section 2(57) of the Act. Since he is a tenant, he has got fixity of tenure. It is contended that even if it is a kudiyiruppu right, the entire 26 cents of land are not necessary for the enjoyment of the residential building and the easements attached therein. Holding is defined under Section 2(17) of the Act as follows:

> "17. "Holding" means a parcel or parcels of land held under a single transaction by a tenant from a landlord and shall include any portion of a holding as above defined which the landlord and the tenant have agreed or are bound to treat as a separate holding."

Considering the provisions of the deed and considering the development and subsequent acts and also the concurrent findings entered by the authorities below, we are of the opinion that no interference is required by this Court in a petition under Article 227 of the Constitution or in a Second Appeal in the findings that respondents have got kudiyiruppu right alone to hold the entire holding. Three authorities below concurrently found as a finding of fact after considering the evidence that the entire 26 cents is kudiyiruppu and a single holding. there is no perverse finding or patent error of law. No substantial question of law also arises here.

3. The order of the appellate Court was challenged before this Court

in a writ petition under Article 227 of the Constitution of India. The learned Single Judge referred the matter as the learned judge was of the view that only a Second Appeal is maintainable and not a writ petition. In fact, a Second Appeal was filed by the petitioner and at that time the matter was returned as no Second Appeal will lie and thereafter only he filed an original petition. We are not considering this question at this distance of time, on the facts of this case. After 10 years of the filing of the original petition it is not proper for this Court to dismiss the case as an original petition is not maintainable and to non-suit the petitioner because of non filing of the Second Appeal. Whether it is a Second Appeal or an Original Petition, this Court has power to deal with the same. Therefore, we have considered the matter on merits and we are of the opinion that no grounds are made out for interference in the concurrent findings of the Court below as well as the findings of the Land Tribunal even if the petition is treated as an appeal or as a writ petition under Article 227 of the Constitution.

4. The petitioner has also questioned the issuance of Ext.P11 notice by the Land Tribunal. That was issued on the basis of an application for issue of purchase certificate. Even though the respondents are entitled to fixity of tenure, for getting pattayam as provided under Section 72 of the K.L.R. Act, value has to be fixed and the proportionate amount as

prescribed under the Act has to be deposited. That is why Ext.P11 notice was issued. It is only a notice for assignment of land in view of the fixity of tenure granted. We see no ground to quash a mere notice in a petition filed under Article 227 of the Constitution of India. If the petitioners have got any objection, it is for them to raise objection before the authority concerned.

The original petition is dismissed on merits.

(J.B. Koshy, Judge.)

(T.R. Ramachandran Nair, Judge.)

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J.B. Koshy & T.R. Ramachandran Nair, JJ.

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